

UNIFORM LAW COMMISSION
New Acts 2018: Summaries

UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

The disclosure of private, sexually explicit images without consent and for no legitimate purpose—often referred to as “revenge porn”—causes immediate, devastating, and in many cases irreversible harm. A vengeful ex-partner, opportunistic hacker, or other person with malintentions can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as be emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Additionally, victims of revenge porn often find their personal safety is at a heightened risk after an unauthorized disclosure is made. Incidents of revenge porn and non-consensual pornography are increasing nationally. States have adopted criminal and civil laws to address this issue, however, they differ considerably in their definitions, scope, effectiveness, and remedies. This lack of uniformity creates confusion and inefficiency and leaves victims without a clear path to justice. In response to this issue the Uniform Law Commission promulgated the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) in 2018.

Section 3 of the UCRUDIIA creates a cause of action for the unauthorized disclosure of intimate images. The basic elements of this cause of action are: (1) an intentional disclosure or threat to disclose; (2) an intimate image; (3) of an identifiable individual; and (4) without the consent of the depicted individual. Additionally, the act limits liability to those who (5) know or show reckless disregard for whether the depicted individual had a reasonable expectation of privacy or know or show reckless disregard for whether the intimate image was made accessible through theft, bribery, or similarly unlawful means. The act leaves the question of whether a cause of action under this act survives the death of the depicted individual for the states to decide.

Section 4 provides for exceptions to liability for disclosures made in good faith under the act. Disclosure is permitted for law enforcement, legal proceedings, medical education or treatment and other proper needs. Section 4 further provides that a discloser who is a child’s parent or legal guardian, or individual with legal custody of the child is not liable under the act for the disclosure or threatened disclosure of an intimate image, unless the disclosure was prohibited by law other than this act or made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

Section 5 protects the privacy of a plaintiff. This section allows the plaintiff to use a pseudonym and otherwise protect his or her identity. Section 5 further permits the court to exclude or redact other identifying characteristics of the plaintiff from all pleadings and documents filed in the action. To exercise this right, a plaintiff must file with the court a confidential information form that includes the plaintiff’s real name and other information and serve a copy of this form on a respondent.

Section 6 provides various remedies for victims. A prevailing plaintiff may recover actual damages, statutory damages, punitive damages, and attorney's fees. A plaintiff may also recover an amount equal to the gain made by the respondent from disclosure of the intimate image if applicable. Section 6 does not affect a right or remedy available under other law.

Section 7 addresses statutes of limitations. Under this section, an action for the unauthorized disclosure of intimate images must be brought no later than four years from the date the unauthorized disclosure was discovered or should have been discovered with the exercise of reasonable diligence. Actions brought under the act for a threat to disclose an intimate image must be brought no later than four years from the date of the threat to disclose. The act also applies relevant state tolling statutes. For actions brought by individuals who are minors, this section provides states with an optional provision allowing the statute of limitations to begin running on the date the depicted individual attains the age of majority. This section is drafted to allow states to choose a different period of limitation if desired.

Section 8 excludes interactive computer service providers from coverage under the act to the extent they are already protected under federal law. This section does not alter state law on sovereign or governmental immunity.

UNIFORM CRIMINAL RECORDS ACCURACY ACT

Many developments concerning criminal records have occurred over the past twenty years, including the creation of the National Criminal Background Check System in 1993, the establishment of criminal history repositories in all states, and the increasing use of criminal record checks in connection with eligibility for employment, professional and occupational licenses, credit worthiness, and other non-criminal justice purposes. Recent studies have demonstrated that criminal records accessed for these purposes may be inaccurate or incomplete. Some of the causes of inaccuracy or incompleteness are: lack of information on dispositions after an arrest; data entry errors such as an incorrect listing of the offense, or multiple listings of the same offense, or attribution of an offense to a wrong individual; criminal identity theft; and searches for criminal record information resulting in one person's criminal record information appearing in search results initiated for a different individual.

Although precise numbers are hard to come by the FBI has over 77.7 million individuals on file in its master criminal database involving felonies and misdemeanors. Criminal history record information (commonly called a RAP sheet) is generated when an individual is arrested or charged with an offense. The RAP sheet includes information on arrests, charges, bail, detention, convictions, acquittals, and sentencing. It should but does not always include the disposition after an arrest when no charges are filed, or charges are dropped. Criminal history record information is being used in an increasing number of contexts, including employment, housing, licensing, and public services.

The Uniform Criminal Records Accuracy Act is designed to improve the accuracy of criminal history record information that are frequently used in determining the eligibility of a person for employment, housing, credit, and licensing, in addition to law enforcement purposes.

The act is premised on three principles:

1. Society has a vital interest in the accuracy of criminal history record information.
2. Subjects are entitled to have their criminal history record information kept accurate.
3. The government has an obligation to ensure that the criminal history record information that it collects, stores, maintains, submits and disseminates is accurate.

The act imposes duties on governmental law enforcement agencies and courts that collect, store and use criminal history records, to ensure the accuracy of the criminal history record information. The act provides that states create a central repository (Section 201) and mandates that any criminal history records information be submitted to the central repository no later than five days after the information is collected.

The act requires the collection of biometric information, such as finger prints, for purposes of identification, when permitted or required by other law (Section 202). The use of biometric information should help ensure more complete and accurate records.

The act limits the dissemination of criminal history record information only as permitted by this act or by other law (Section 204). A dissemination log must be maintained to record all disclosures (Section 304).

The act provides individuals the right to see their criminal history record information (Section 302). The act further provides individuals the right to correct errors in their criminal history record information (Section 401).

The act mandates the creation and maintenance of a mistaken identity prevention registry (Section 501). Through use of a mistaken identity prevention registry, the act also provides a mechanism by which an individual, whose name is similar to and confused with a person who is the subject of criminal-history-record information, can receive a certification to minimize the possibility of a mistaken arrest. It is prima face evidence of the fact and can be used when applying for housing, employment, credit, or other opportunities.

The act provides for several oversight functions, such as establishing procedures for conducting periodic audits of criminal history record information (Section 602).

The act includes optional remedies for enforcement for non-compliance (Sections 701 and 702).

Accurate criminal history record information is essential for a properly functioning criminal justice system. Errors can result in problems for both citizens and law enforcement officials. The goal of the Uniform Criminal History Records Accuracy Act is to assure the accuracy of the information contained in criminal-history-record information, and to provide a means for an individual to seek correction of inaccurate information.

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

The Uniform Fiduciary Income and Principal Act (UFIPA), approved by the Uniform Law Commission in 2018, is an updated version of the Uniform Principal and Income Act (UPIA). For this latest revision, the title was changed to differentiate the act from its predecessors, and also to avoid confusion with the closely related Uniform Prudent Investor Act, which shared the UPIA acronym. The Uniform Principal and Income Act was originally approved by the ULC in 1931 and revised twice in 1962 and 1997. Nearly every state has adopted a version.

Traditionally, beneficiaries of many trusts were either entitled to receive income earned by the trust investments, or to inherit a share of the trust principal. In this scenario, the trustee's allocation of receipts and expenditures to income or principal had a direct effect on the beneficial interests. The UPIA provided a set of accounting rules to guide trustees in making these allocations.

In the last few decades, the historical distinction between income and principal has become less important for two reasons. First, the development of modern portfolio theory allows trustees to invest for the maximum total return, whether the return is in the form of income or growth of principal. Second, modern trusts are often drafted with more flexible terms giving trustees discretion to accumulate income or invade principal when advantageous to further the purposes of the trust. UFIPA recognizes these developments and gives trustees additional flexibility to administer discretionary trusts.

The 1997 UPIA did not include provisions for converting a traditional trust into a "unitrust" to allow for total-return investing. At the time the tax treatment of unitrusts was uncertain, so the drafters instead added a section allowing a trustee to adjust between income and principal as necessary. This created an administrative burden for trustees that could be avoided with a unitrust. Then in 2003 the Internal Revenue Service published regulations respecting unitrust conversions under certain conditions if authorized under state law. Once federally sanctioned, over thirty states amended their UPIA statutes to allow unitrust conversions in some form, but these statutes are not uniform and often overly restrictive.

Article 3 of UFIPA contains flexible and innovative unitrust provisions that improve upon current state laws. Trustees can establish a unitrust policy with a variable or adjustable rate of return based on market conditions or on the needs of individual beneficiaries. A proposed unitrust policy must be disclosed in advance to beneficiaries who may consent or object. Restrictions apply when the trust qualifies for certain tax benefits to ensure compliance with federal regulations.

UFIPA Section 104 provides a new default rule on governing law. The law of the situs of the trust will apply, unless the terms of the trust specify a different jurisdiction. This rule is consistent with other uniform trust and estate acts and will help prevent multi-state disputes.

The 2018 UFIPA replaces the former Uniform Principal and Income Act and should be considered by any state that adopted the prior act.

REVISED UNIFORM LAW ON NOTARIAL ACTS (2018)

The Revised Uniform Law on Notarial Acts (RULONA) was promulgated by the Uniform Law Commission (ULC) in 2010. Among its features, it included provisions to provide a stable infrastructure for the performance of notarial acts with respect to electronic records and signatures.

Amendments to Revised Uniform Law on Notarial Acts, including a new Section 14A on remote notarization, were approved by the ULC in 2018, resulting in RULONA (2018). If a state has already adopted RULONA, it will update to the current version by enacting new subsection 4(c), new Section 14A, and new subsection 20(c). If a state has not previously enacted RULONA, it should enact RULONA (2018).

RULONA (2018) was prepared in response to a rapidly emerging trend among the states to authorize the performance of notarial acts by means of audio-visual technology. Traditionally, an individual has been required to physically appear before a notary public. In recent years, technology and commercially available identification services have made it possible to perform notarial acts for persons who are not in the physical presence of a notary public. RULONA (2018) authorizes remote notarization without geographic limits on the location of the signer.

RULONA (2018) updates RULONA (2010) by authorizing a notary public to perform notarial acts for remotely located individuals using communication and identity-proofing technology provided its requirements have been fulfilled. The new provisions:

- Provide that an individual may appear before a notary public by means of communication technology and thereby comply with the provisions of RULONA Section 6 calling for appearance before a notary public (Section 14A (b)).
- Define communication technology as any means or process that allows a notary public and a remotely located individual to communicate with each other simultaneously (Section 14A (1)(A)). Specific technology is not identified in the amendment.
- Specify the means by which a notary public must identify a remotely located individual (Section 14A (c)(1)). This includes personal knowledge of the identity of the individual, and evidence of the identity of the remotely located individual by oath or affirmation from a credible witness.
- Permit a notary public to identify a remotely located individual by at least two different types of identity-proofing processes or services (Section 14A (c)(1)(C)). This may include having a remote individual answer questions for which there is a high probability that only the true individual would be able to answer correctly or using biometric identification technology or credential analysis.
- Require that an audio-visual recording of the performance of the notarial act be created (Section 14A (c)(3)).

- Provide that the certificate of notarial act required under Section 15 must indicate that a notarial act performed in accordance with this Section was done by means of communication technology (Section 14A (d)).
- Provide that the commissioning officer may adopt rules regarding the performance of notarial acts for remotely located individuals (Section 14A (h)).

RULONA (2018) also now specifies that the notarial officer may certify that a tangible copy is an accurate copy of an electronic record and that such certifications may be accepted for recording into the real estate records.

UNIFORM NONPARENT CUSTODY AND VISITATION ACT

The Uniform Nonparent Custody and Visitation Act (UNCVA) (2018) provides states with a uniform legal framework for establishing child custody and visitation rights of nonparents.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court recognized a right of a fit parent to make decisions regarding the rearing of his or her child. With that in mind, the UNCVA seeks to balance, within constitutional restraints, the interests of children, parents, and certain nonparents. Notably, the UNCVA:

- Recognizes a right to seek custody or visitation for two categories of nonparents: (a) nonparents who have acted as consistent caretakers of a child without expectation of compensation, and (b) nonparents who have a substantial relationship (formed without expectation of compensation) with a child and who demonstrate that denial of custody or visitation cause harm to the child with clear evidence.
- Requires that a nonparent's petition be verified and include specific facts on which the request for custody or visitation is based. This will aid courts in filtering out cases in which the petitioner does not have a meritorious claim and will facilitate more efficient and clear procedures for evaluating custody and visitation petitions.
- Provides a presumption that the parent's decision about custody or visitation is in the best interest of the child. A nonparent would have the burden of rebutting that presumption with clear and convincing evidence.
- Requires that when custody or visitation rights are sought, notice must be provided to: (a) any parent of the child; (b) any person having custody of the child; (c) any individual having court-ordered visitation with the child; and (d) any attorney, guardian, or similar representative for the child.
- Provides a list of factors to guide the court's decision regarding the child's best interest. These factors include the child's relationships with parents and nonparents, the opinion of

the child, the age and maturity of the child, past behavior by parents or nonparents, and the impact of the requested rights on the child.

- Provides protections for victims of domestic abuse. The court shall presume that custody or visitation rights are not in the best interests of the child if the court finds abuse, neglect, violence, sexual assault, or stalking was committed by the nonparent or member of the nonparent's household.
- Provides that a nonparent granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation.
- Does not apply to a proceeding between two or more nonparents unless a parent is party, nor does the act apply to children who are the subject of proceedings for abuse, neglect, or dependency. In addition, under an optional provision, a nonparent may not maintain a proceeding under this act solely on the basis of having served as a foster parent.

Continuation of a relationship between a child and a nonparent can be in the best interests of the child. This act balances the right of a child to maintain contact with a nonparent with whom the child has developed a bonded relationship (other than a paid-child-care provider) and the rights of a parent.

UNIFORM SUPPLEMENTAL COMMERCIAL LAW FOR THE UNIFORM REGULATION OF VIRTUAL- CURRENCY BUSINESSES ACT

The Uniform Supplemental Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act (the "Supplemental Act") is a follow-up to the Uniform Regulation of Virtual-Currency Businesses Act ("URVCBA"). The URVCBA establishes a regulatory framework for virtual-currency businesses to operate either by license or registration in a state and creates safeguards to protect users of virtual-currency business services. While the URVCBA provides numerous robust user protections based on commercial law principles, it does not directly address the commercial law rules for transactions and relationships between virtual-currency businesses and consumers.

The Supplemental Act provides commercial law rules using the time-tested duties and rights of customers of securities intermediaries under the Uniform Commercial Code. The Supplemental Act does this by requiring the incorporation of Article 8 of the Uniform Commercial Code into the agreement made between a virtual-currency licensee or registrant and users.

This approach provides certainty and finality to virtual-currency transactions by treating virtual currency as a financial asset under UCC Article 8 rules. This makes virtual currency "negotiable" by allowing good faith purchasers for value to achieve "protected purchaser" status. This also facilitates the use of virtual currency as collateral for UCC Article 9 secured transactions.

The utilization of UCC Article 8 to supply the commercial law rules does not determine the

characterization or treatment of virtual currency under other laws, such as income taxation or securities or commodities regulation.

The act also provides that a party's failure to comply with the Supplemental Act is a violation of the URVCBA, which may result in civil penalties and license or registration revocation or suspension.

The Supplemental Act is designed to be effective to replace the user protections in Section 502 of the URVCBA in a state that already has the URVCBA or to be effective when a state enacts the URVCBA.